IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD LEWIS ASHKER and DANNY TROXELL,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER; R.Q. HICKMAN; EDWARD ALAMEIDA, JR; JEANNE WOODFORD; JOE MCGRATH; CAROL A. DALY; SHARON LAWIN; CAL TERHUNE; GEORGE LEHMAN; MR. ROOS; BOOKER T. WELCH; BRETT GRANLUND; LARRY STARN; KENNETH L. RISEN; JONES M. MOORE; GRAY DAVIS; PETE WILSON; JAMES GOMEZ; and DOES 1 through 10;

Defendants.

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No. C 04-1967 CW

ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

All Defendants move, pursuant to Federal Rule of Federal Procedure 12(b), to dismiss the complaint filed by Plaintiffs Todd Lewis Ashker and Danny Troxell, for failure to exhaust administrative remedies. Defendants Daly, Lawin, Lehman, Roos, Welch, Granlund, Starn, Risen and Moore are all commissioners of the Board of Prison Terms (BPT). These Defendants (BPT Defendants) also move, pursuant to Federal Rule of Civil Procedure 56, for summary judgment of absolute and qualified

immunity. Plaintiffs oppose the motions.[1] The matter was taken under submission on the papers. Having considered the parties' papers and the evidence cited therein, the Court GRANTS in part Defendants' motion to dismiss for failure to exhaust administrative remedies and GRANTS the BPT Defendants' motion for summary judgment of absolute and qualified immunity from Plaintiffs' damages claims.

BACKGROUND

Plaintiffs are both inmates in the Secure Housing Unit (SHU) at Pelican Bay State Prison. Ashker was sentenced to a six year prison term for burglary in 1984. In 1990, he was convicted of the second degree murder of another inmate at Pelican Bay, and was sentenced to a prison term of twenty-one years to life. Ashker has been housed in the SHU at Pelican Bay since 1990. Troxell is serving a prison term of twenty-six years to life pursuant to a 1979 plea of guilty to first degree murder. Troxell has been housed at the Pelican Bay SHU since 1989.

Both Plaintiffs are validated members of the Aryan Brotherhood prison gang; they were each re-validated as gang members on July 8, 2003. Due to their respective gang associations, they are housed in the SHU on "indeterminate" status. According to California Department of Corrections (CDC) policy, Plaintiffs cannot be released from the SHU unless they are paroled, they debrief, or they are inactive in gang activity

[1] Plaintiffs' motion for leave to file a brief in excess of twenty-five pages (Docket No. 24) is GRANTED.

for a period of six years. Troxell is currently working on earning a general education diploma (GED). Ashker has already earned his GED and is now attempting to complete classes for a paralegal certificate.

Troxell's most recent parole hearing was held on July 10, 2001. The BPT denied Troxell parole, ruling that he posed an unreasonable risk of danger to the public. In its decision, the BPT considered, inter alia, the especially callous nature of the commitment offense, Troxell's previous history of criminality, his failure to upgrade educationally and vocationally, his failure to develop sufficient post-parole plans, and his prison disciplinary record. Ashker's most recent parole hearing, which he did not attend, was held on August 7, 2003. The BPT also found that Ashker posed an unreasonable risk of danger to the public, noting the nature of his murder of a fellow inmate, his history of criminality and his prison disciplinary record.

Ashker submits evidence that, in both 1992 and 1999, he filed administrative challenges to his gang validation and, in 2001, he challenged a finding that he was not an inactive gang member. Ashker also offers evidence that he appealed, in October, 2003, the BPT's decision in August of that year to deny him parole. On October 5, 2003, Ashker submitted an administrative appeal challenging the CDC policy of keeping him in the SHU on indeterminate status as a result of his gang validation. That appeal was denied at the first level on November 6, 2003. On November 16, 2003, Ashker registered his "dissatisfaction" with the first level decision, stating that

his appeal should have been sent directly to the warden (i.e. second level review) because it addressed a prison policy. On November 25, Ashker's appeal was returned to him because he had failed to argue why the first level review determination was erroneous. On December 9, 2003, Ashker sent the form back to the appeals coordinator, stating again that his appeal should have been reviewed initially at the second level. On January 14, 2004, Ashker's complaint was again sent back to him because he had not filled out the necessary sections. No further action was taken on that appeal. Defendants acknowledge that, on May 3, 2004, Ashker exhausted a different appeal relating to the prison's policy prohibiting hard cover books in the SHU.

On October 4, 2003, Troxell filed an administrative appeal challenging the CDC policy of keeping him in the SHU on indeterminate status as a result of his gang validation. That appeal was denied, and Troxell appealed the denial. However, as in Ashker's case, the appeal was never processed through the second or third levels of review because Troxell did not comply with administrative filing procedures. In February, 2004, Troxell filed an administrative appeal asking for review of his gang status, which was rejected by the appeals coordinator as untimely. Troxell also filed several administrative appeals that Plaintiffs acknowledge were not exhausted when this complaint was filed.

Plaintiffs filed this complaint on May 19, 2004, against Governors Arnold Schwarzenegger, Gray Davis and Pete Wilson, the BPT Defendants, Roderick Hickman (Secretary of the California

Youth Authority), Jeanne Woodford (Director of CDC), James Gomez, Cal Terhune and Edward Alameida (former CDC Directors), and Joe McGrath (Warden of Pelican Bay). The complaint alleges the following causes of action: (1) violation of First Amendment freedom to associate with members of the Aryan Brotherhood, (2) violation of First Amendment freedom of speech for not allowing hard cover books, (3) violation of Fifth Amendment freedom against self-incrimination for CDC's debriefing requirement, (4) violation of Eighth Amendment prohibition of cruel and unusual punishment, also arising from the debriefing requirement, (5) violation of the due process and equal protection clauses of the Fourteenth Amendment and of the ex post facto clause for retention in SHU on indeterminate status based upon gang association, (6) violation of the equal protection clause of the Fourteenth Amendment based upon alleged discrimination against white inmates, and (7) supplemental State law claims. Plaintiffs' complaint specifically states that they are not challenging the BPT's discretionary functions but, rather, policies that keep non-debriefing inmates in the SHU on indeterminate status and that prevent inmates in SHU from being paroled. The complaint seeks declaratory and injunctive relief as well as damages. The Court issued a screening order on October 19, 2004 and set a briefing schedule for case dispositive motions.

LEGAL STANDARD

I. Motion to Dismiss

Title 42 U.S.C. section 1997e provides, "No action shall be

brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Under this section, an action must be dismissed unless the prisoner exhausted his available administrative remedies before he filed suit. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). It is not sufficient if the inmate exhausts his available remedies during the course of litigation. Id. The exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).

Although the exhaustion requirement is mandatory, see Booth v. Churner, 532 U.S. 731, 739 (2001), it is not jurisdictional, Wyatt v. Terhune, 315 F.3d 1108, 1117 n.9 (9th Cir.), cert. denied, Alameida v. Wyatt, 124 S. Ct. 50 (2003). Therefore, district courts have some discretion in determining compliance with the statute. See Wyatt v. Leonard, 193 F.3d 876, 879 (6th Cir. 1999).

Under section 1997e(a), non-exhaustion is an affirmative defense -- defendants have the burden of raising and proving the absence of exhaustion. Wyatt, 315 F.3d at 1119. The defense of non-exhaustion is properly raised in an unenumerated Rule 12(b) motion, and when deciding the motion the court may look beyond the pleadings and decide disputed issues of fact. Id. at 1119-

20. The court's role is to determine whether the evidence is adequate to establish non-exhaustion. See id. at 1120.

II. Motion for Summary Judgment

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by

demonstrating that "there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. Id.; see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991), cert. denied, 502 U.S. 994 (1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the opposing party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." Bhan, 929 F.2d at 1409. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Celotex, 477 U.S. at 323.

DISCUSSION

I. Motion to Dismiss

Defendants argue that Plaintiffs did not exhaust all of the available administrative remedies prior to bringing their claims. The State of California provides its inmates and parolees the right to appeal administratively "any departmental decision, action, condition or policy perceived by those individuals as adversely affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust available administrative remedies within this system, a prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal

form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the Director of the California Department of Corrections. Id. § 3084.5; Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997).

Plaintiffs have submitted no evidence that they brought even the initial inmate appeals for the first (freedom to associate with members of Aryan Brotherhood), third (freedom from self-incrimination arising from debriefing requirement), fourth (debriefing requirement as cruel and unusual punishment) or sixth (white inmates treated differently in violation of the equal protection clause) causes of action in their complaint. Plaintiffs also acknowledge that Troxell did not bring an initial inmate appeal for violation of his First Amendment freedom of speech arising from the SHU's prohibition on hard cover books, which is Plaintiffs' second cause of action.

Plaintiffs do submit evidence that both Troxell and Ashker, on October 4 and 5, 2003, respectively, filed initial inmate appeals that they were being held in the SHU on indeterminate status, which they alleged effectively changed their sentences to life without parole. Thus, Plaintiffs did initiate the administrative review procedure for their fifth cause of action. However, the evidence is clear that neither Ashker nor Troxell exhausted the available administrative processes for their appeals on this issue; neither inmate appeal was ever processed through the second stage of review because Ashker and Troxell failed to adhere to the prison's administrative filing procedures.

The evidence shows that the only cause of action in the complaint for which the administrative procedures have been exhausted is Ashker's second cause of action for violation of his First Amendment freedom of speech, arising from the SHU's policy prohibiting hard cover books. Plaintiffs have submitted evidence that both Ashker and Troxell exhausted available administrative remedies for inmate appeals seeking to overturn their gang validations. However, Plaintiffs acknowledge that their complaint does not challenge their classifications as gang members.

Defendants urge the Court to follow the Eight Circuit's rule, announced in Graves v. Norris, 218 F.3d 884 (8th Cir. 2000), that the entire lawsuit must be dismissed without prejudice if an incarcerated plaintiff fails to exhaust the administrative remedies for all of his claims. The Second Circuit, in Ortiz v. McBride, 380 F.3d 649 (2nd Cir. 2004), ruled that total exhaustion was not required, and that the plaintiff in that case could proceed with his exhausted claims. District courts in this Circuit are split on the issue. See Snow v. Terhune, 2002 WL 257841 (N.D. Cal. Feb. 14, 2002) (following Graves); Blackmon v. Crawford, 305 F. Supp. 2d 1174 (D. Nev. 2004) (ruling that total exhaustion not required). Here, the Court declines to follow the Eighth Circuit's total exhaustion rule. Thus, Defendants' motion to dismiss Ashker's second cause of action, for which he exhausted the available administrative remedies, is denied. Defendants' motion to dismiss the remaining causes of action in Plaintiffs' complaint

is granted because Plaintiffs failed to exhaust the administrative remedies for those claims.

II. Motion for Summary Judgment

The BPT Defendants also move for summary judgment of absolute immunity from the claims in Plaintiffs' complaint. In addition, the BPT Defendants argue that they are entitled to summary judgment of qualified immunity from Plaintiff's damages claims.

A. Absolute Immunity

The BPT Defendants rely upon Swift v. California, 384 F.3d 1184, 1189 (9th Cir. 2004), which held that "parole board members are entitled to absolute immunity when they perform 'quasi-judicial' functions" such as making decisions whether to grant, revoke or deny parole. The BPT Defendants also cite Sellars v. Procunier, 641 F.2d 1295, 1303 (9th Cir. 1981), which similarly held that parole board officials perform functionally comparable tasks to judges, and that granting them absolute immunity ultimately serves the public's interest, even while "leav[ing] the genuinely wronged prisoner without civil redress against the official whose malicious or dishonest actions deprive the prisoner of liberty."

The Ninth Circuit cases that Plaintiffs rely upon to support their argument that the BPT Defendants are not entitled to absolute immunity, Thompson v. Davis, 295 F.3d 890 (9th Cir. 2002) and Armstrong v. Davis, 275 F.d3d 849 (9th Cir. 2001), did not address the issue of absolute immunity because, in those cases, the plaintiffs sought only prospective injunctive relief.

Plaintiffs have cited no authority, and the Court knows of none, holding that BPT members may be liable for damages arising from their decisions to deny or revoke parole.

Defendants acknowledge that absolute immunity is not a defense against claims for declaratory or injunctive relief. See Ex parte Young, 209 U.S. 123, 159 (1908); Am. Fire, Theft & Collision Managers v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiffs seek both declaratory and injunctive relief against the BPT Defendants. The BPT Defendants' argument that Plaintiffs' request for injunctive relief is moot or otherwise not a cause of action is not persuasive.

For the foregoing reasons, the Court grants the BPT Defendants' motion for summary judgment of absolute immunity from Plaintiffs' damages claims. However, Plaintiffs may pursue their claims for declaratory and injunctive relief against these Defendants.

B. Qualified Immunity

The BPT Defendants are also entitled to qualified immunity from Plaintiffs' damages claims. The defense of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The threshold question is whether, taken in the light most favorable to the plaintiff, the facts alleged show that the official's conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). The

plaintiff bears the burden of proving the existence of a clearly established right at the time of the allegedly impermissible conduct. Maraziti v. First Interstate Bank, 953 F.2d 520, 523 (9th Cir. 1992). If the law is determined to be clearly established, the next inquiry is whether a reasonable official could have believed his conduct was lawful. Act Up!/Portland v. Bagley, 988 F.2d 868, 871-72 (9th Cir. 1993).

Plaintiffs assert that their constitutional rights were violated when the BPT Defendants denied Plaintiffs parole based upon their indeterminate status in Pelican Bay's SHU. However, the evidence submitted shows that the BPT took several factors into account when it denied Plaintiffs' parole applications. In particular, the BPT emphasized the violent nature of Plaintiffs' commitment crimes and the risk of danger that the board determined Plaintiffs pose to society. Thus, even if Plaintiffs are correct in their assertion that California has an unconstitutional "no SHU parole policy," they have submitted no evidence that such a policy has been applied to them personally or that their individual constitutional rights have been violated.

The second prong of the qualified immunity analysis, whether the BPT Defendants could have reasonably believed that their actions were legal, also favors the BPT Defendants. The qualified immunity standard is difficult for Plaintiffs to meet. In Sorrels v. McKee, 290 F.3d 965 (9th Cir. 2002), the plaintiff challenged a prison policy that, pursuant to Washington State law, did not allow the plaintiff to receive a complimentary book

that had been sent to him by a publisher. The Ninth Circuit, after acknowledging that the district court had ruled that the prison's policy was unconstitutional, upheld the district court's finding that qualified immunity nevertheless applied: "To defeat the defendants' claim of qualified immunity, then, [the plaintiff] had to show that the policy was such a far cry from what any reasonable prison official could have believed was legal that the defendants knew or should have known they were breaking the law." Id. at 971. Here, the evidence is clear that the BPT Defendants followed, in denying Plaintiffs parole, the parole determination guidelines that are required by State law. However, unlike in Sorrels, there is no evidence that the BPT Defendants applied an unconstitutional "no SHU parole policy" to Plaintiffs in making the parole determinations. Thus, the BPT Defendants were reasonable in their belief that they acted legally in denying Plaintiffs parole.

For the foregoing reasons, the BPT Defendants are entitled to summary judgment of qualified immunity from Plaintiffs' damages claims against them.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED in part and the BPT Defendants' motion for summary judgment of absolute and qualified immunity from Plaintiffs' damages claims is GRANTED (Docket No. 13). Defendants' motion to dismiss Ashker's second cause of action, for violation of his First Amendment freedom of speech arising from the prison's policy of not allowing hard cover books in the SHU, is DENIED.

Plaintiffs' remaining claims are dismissed without prejudice. Plaintiffs' motion for leave to file a brief in excess of twenty-five pages (Docket No. 24) is GRANTED.

IT IS SO ORDERED.

Dated: 6/2/05

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge